

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Raw Bandwidth Communications, Inc.,

Complainant,

vs.

SBC California, Inc. (U-1001-C) and SBC Advanced  
Solutions, Inc. (U-6346-C),

Defendants.

Case 03-05-023  
(Filed May 15, 2003)

**SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER ON  
MOTION TO DISMISS AND PRELIMINARY MATTERS**

**Summary**

Pursuant to Rules 6(b)(3) and 6.3 of the Rules of Practice and Procedure, this Ruling sets forth the procedural schedule, assigns a presiding officer, and addresses the scope of the proceeding after the August 20, 2003 prehearing conference (PHC). This Ruling also partially grants and partially denies SBC California and SBC Advanced Solutions, Inc.'s (SBC ASI) (Jointly, Defendants) motion to dismiss.

**Background**

Raw Bandwidth Communications, Inc. (Raw Bandwidth) alleges that SBC California and SBC ASI discriminate in the provision of Digital Subscriber Lines (DSL) Transport, fail to furnish sufficient information for informed consumer choice, fail to furnish just and reasonable telephone service and DSL Transport,

and unreasonably disconnect DSL Transport when the end user makes changes to their voice service in violation of Pub. Util. Code §§ 451, 453, 532, and 2896. Raw Bandwidth requests that the Commission order Defendants to revise certain business practices, audit telemarketing firms' scripts, not disconnect the DSL Transport service when changes are made to the underlying voice service, refund service charges to Raw Bandwidth, and impose penalties on Defendants.

Defendants separately answer and deny Raw Bandwidth's allegations, deny that Complainant is entitled to relief requested or any relief and contend that the Commission has no jurisdiction over non-telecommunications services at issue in the Complaint and over DSL Transport, which is jurisdictionally interstate. Defendants further contend that Federal Communications Commission (FCC) orders permit certain activities complained of and that certain relief requested is prohibited by law.

Prior to the PHC, the parties settled some issues and on July 8, 2003 Raw Bandwidth filed a request for withdrawal of two issues concerning listing Internet Service Providers (ISP) on the SBC.com web page. The request was unopposed and Raw Bandwidth's request to withdraw First Cause of Action, Count 1, and Second Cause of Action, Count 1, will be granted.

On June 30, 2003, Defendants filed a motion to dismiss the verified complaint of Raw Bandwidth, because DSL Transport is an interstate service subject to the jurisdiction of the FCC. On August 19, Complainant filed a PHC statement and requested that action on two issues, concerning delay in moving DSL service from one address to another in the same central office and unreasonably disconnecting DSL Transport when the end user makes changes to voice service, be delayed. Complainant also reported that parties might settle

other issues and that inaccuracies in the CD ROM versions of telephone bills have been resolved.

### **Motion to Dismiss**

A motion to dismiss<sup>1</sup> essentially requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice. (*Westcom Long Distance, Inc. v. Pacific Bell et al.*, Decision (D.) 94-04-082, 54 CPUC2d 244, 249.) Defendants' motion to dismiss is partially granted and partially denied, as discussed below.

### **Jurisdiction**

Defendants assert the Commission has no jurisdiction over DSL Transport. Complainant states that the Commission has jurisdiction because DSL Transport is detariffed at the federal level, there is an intrastate tariff for RLAN DSL, and the Commission asserted jurisdiction over DSL in D.03-07-032. Defendants further assert that SBC California can provide customer support to customers of the SBC-affiliated ISP under existing law without providing the same support to Complainant, that customer privacy laws preclude SBC California from providing Raw Bandwidth with information concerning changes in underlying voice service, and that the previous tariff and current contract provide that DSL Transport only is offered over a telephone line where line-sharing exists.

The Commission has resolved that it has concurrent jurisdiction with the FCC over DSL. (D.03-07-032, 2001 Cal. PUC LEXIS 1232 \*4.) The Commission's

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<sup>1</sup> Defendants filed their motion to dismiss pursuant to Rule 45 of the Commission's Rules of Practice and Procedure.

jurisdiction encompasses enforcement of California law and Commission orders, including consumer protection and service quality, but does not extend to rates, operating speeds and other matters included in federal tariffs. (*See id.*) This Complaint does not raise rate issues or technical matters within the ongoing jurisdiction of the FCC in a detariffed environment. Defendants' motion to dismiss this Complaint for lack of jurisdiction over DSL Transport is denied.

### **611 Referral**

Defendants assert SBC California is permitted as a matter of law to provide customer support to SBC's ISP (SBCIS). Therefore, it is not discriminatory to give callers to SBC California's 611 Help Line the option to be directly connected to SBCIS. Complainant disputes that contention and alleges that the FCC requires SBC California to offer the same access to enhanced services to other ISPs as it does to its own ISP. As noted by Defendants, the authority cited by Complainant for that proposition merely requires that local exchange service providers should be able to use 611 for repair and their customers should be able to reach their own carriers' repair service when dialing 611. However, Defendants' reliance on the joint marketing provisions of the FCC's Computer III decision does not support their claim that they can provide customer support to SBCIS.

It is unclear whether Defendants' practice of referring SBCIS's customers to 611 when declining to provide that same service to Raw Bandwidth's customers is contrary to the provisions of the FCC's Merger Order, *In Re Applications of Ameritech Corp. and SBC Communications, Inc.*, (1999) CC Docket No. 98-141, 14 FCC Rcd. 14712, ¶ 473.) Defendants also noted at the PHC that it might be necessary to take evidence on this issue. For the foregoing reasons, I decline to dismiss Count 3 of the First Cause of Action.

### **Notice When Voice Service Will Be Disconnected**

Customers have the right to privacy when their service is disconnected or about to be disconnected. (D.92-06-063, *Jama vs. PG&E*, 44 CPUC2d 682.)

Defendants cannot inform Complainant when the underlying voice service is about to be disconnected without violating those customers' privacy rights.

Complainant asserts there is no privacy violation, because it only wants advance notice of disconnection of the DSL Transport service that it purchases. However, such advance notice only would be necessary if the underlying voice service also was going to be disconnected, negating Complainant's claim that there would be no privacy concern. Once underlying voice service is disconnected, SBC ASI no longer can furnish DSL Transport under its contract with Complainant and so notifies Complainant. The parties disagree on whether Defendants' customer service representatives fail to warn customers who are disconnecting their voice service that their DSL service also will be disconnected.

Complainant does not refute Defendants' contention that the DSL Transport tariff/contract provides for disconnection when the underlying voice service is disconnected. Instead, Complainant alleges the failure to provide notice to Complainant is not adequate, efficient, just and reasonable as required under Pub. Util. Code §§ 451, and 2896. Because the relief Complainant requests has privacy impacts, Defendants' motion to dismiss Complainant's Third Cause of Action, Counts 3 and 4, is granted. However, I will grant Complainant leave until September 22, 2003, to amend the Complaint to request relief that would obviate these privacy impacts.

### **Scope of the Proceeding**

The remaining dispute between the parties centers on three issues:

1. Whether Defendants discriminate by providing customers of its affiliated ISP, SBCIS, who dial 611 the option of transferring to SBCIS and by telling unaffiliated ISP's customers they must hang up and contact that ISP.
2. Whether Complainant is entitled to refunds, credits or other relief for Defendants' failure to provide accurate CD ROM versions of bills.

3. Whether Complainant is entitled to relief for Defendants' telemarketing firms' alleged statements that end user customers must subscribe with an affiliated ISP if the customer wants to obtain DSL Transport from Defendants.

### **Schedule**

The schedule for this proceeding is as follows:

<b>Event</b>	<b>Schedule</b>
September 22, 2003	Complainant and Defendants serve opening testimony
October 10, 2003	Complainant and Defendants serve rebuttal testimony
October 15, 2003	Evidentiary hearings starting at 10:00 a.m., Wednesday, October 15, Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California
....	Concurrent briefs filed, per schedule to be set by later ruling/Projected submission date
....	Presiding Officer's Decision filed within 60 days of submission

### **Category of Proceeding and Need for Hearing**

This ruling confirms this case as an adjudication scheduled for hearing, as preliminarily determined in the Instructions to Answer.

### **Designation of Presiding Officer**

Administrative Law Judge Janice Grau will be the presiding officer.

**Ex Parte Rules**

Ex parte communications are prohibited in adjudicatory proceedings under Pub. Util. Code § 1701.2(b) and Rule 7 of the Commission's Rules of Practice and Procedure.

**IT IS RULED** that:

1. Raw Bandwidth Communications, Inc.'s request to withdraw selected portions of its Complaint is granted, as set forth herein.
2. SBC California and SBC Advanced Solutions, Inc.'s motion to dismiss is partially granted and partially denied, as set forth herein.
3. The scope of the proceeding is as set forth herein.
4. The schedule for this proceeding is as set forth herein.
5. The presiding officer will be Administrative Law Judge Grau.
6. This ruling confirms that this proceeding is an adjudication scheduled for hearing.
7. Ex parte communications are prohibited under Pub. Util. Code § 1701.2(b) and Rule 7 of the Rules of Practice and Procedure.

Dated September 11, 2003, at San Francisco, California.

/s/ GEOFFREY F. BROWN

Geoffrey F. Brown  
Assigned Commissioner



**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated September 11, 2003, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TTY# 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.